Supreme Court, U.S.
FILED
02 488 SEP 25 2002
OFFICE OF THE CLERK

(1)

NO.

In The

SUPREME COURT OF THE UNITED STATES

David K. Kalan pro sec, Petitioner

v.

City of St. Francis, Respondents

On Petition for Writ of Certiorari
United States Court of Appeals 7th Cir and
United States District Court Eastern District of Wisconsin

PETITION FOR WRIT OF CERTIORARI

David K. Kalan pro sec,
3272 S. Dayfield Ave
Milwaukee WI. 53207
(414) 482-4531

19pp

QUESTIONS PRESENTED

I did not personally stand before Judge Tesmer, give up my right to Jury trial.

Can the District Court and the Court of Appeals 7th Cir sanction the violation of that jury right, rule in conflict with Supreme Court in New York v Hill No. 98-1299 ?

I am denied credit because of the outstanding judgment due to the improper dismissal of jury trial

Is the denial of motion for injunctive relief cruel and unusual punishment?

TABLE OF CONTTENTS

LIST OF PARTIES ii

TABLE OF AUTHORITIES iii

OPINIONS 1

JURISTICTION 2

CONSTITUTION AND STATUTORY PROVISIONS INVOLED 3

STATEMENT OF CASE 4,5

REASONS FOR GRANTING WRIT 6

CONCLUSION 7

PROOF OF SERVICE 8

INDEX TO APPENDICES

APPENDIX A United States Court of Appeals 7th Circuit Order decided July 9, 2002

APPENDIX B United States District Court Eastern District of Wisconsin Order decided March 25, 2002

LIST OF PARTIES

Attorney Richards
Vlasak & Britton S.C.
735 N. Water St 16th Floor West
Milwaukee WI. 53202

TABLE OF AUTHORITIES

Bell v Hood 327 U.S. 678 (1946) 4,5

Brooklyn Savings Bank v O'Neil 324 U.S. 697 704 (1945) ... 4,6

Muckey v Pierce Supreme Court of WI June Term 1854 4

New York v Hill No 98-1299 4

924 16B Am Jur 2d 522 4

In The

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below

OPINIONS BELOW

The order and judgment of Hon. Michael S. Kanne, Circuit Judge, Hon. Ilana Diamond Rovner, Circuit Judge and the Hon. Ann Claire Williams Circuit Judge Court of Appeals for the 7th Circuit. Order. Judgment appears in Appendix A to the petition and is unpublished.

The order of Chief Judge J.P. Stadtmueller, United States District Court Eastern District of WI Judgment appears in Appendix B and is unpublished.

JURISDICTION

The date of Court of Appeals decision is July 9. 2002. A copy of decision appears in appendix A. No petition for rehearing was filed in my case. The Jurisdiction of this court is invoked under 28 U.S.C. 1254(!).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances Amendment 1

In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause to the accusations, to be confronted with the witness against him, to have compulsory process for obtaining witness in his favor, and to have Assistance of Counsel for his defense. Amendment 6

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States! Nor shall any state deprive any person of life liberty, or property without due process of law! Nor deny to any person within its jurisdiction the equal protection of the laws. Amendment 14

STATEMENT OF CASE

I did not personally stand before Judge Tesmer, on the record, and give up my right to Jury demand criminal court case # 1900469. District Court for the Eastern District of WI rule that I gave up my right to jury citing Res judicata in an unrelated case 91CV007608 before Judge Burns. United State Court of Appeals 7th Circuit affirmed that ruling. District Court based its decision on the fact that I had the benefit of counsel.

Counsel cannot waive statutory policy, nor can the state court waive WI statues. See Brooklyn Savings bank v O'Neil 324 U.S. 697 704 (1945) "Every state official, high and low is bound by the 14th Amendment including officials of the executive and judicial." 924 16B Am Jur 2d 522.

It is clear that the District Court and the Court of Appeals 7th Circuit ruling is in conflict with Supreme Court Case New York v Hill No 98-1299 certain fundamental can not be waive.

I requested the District Court and the Court of Appeals 7th Circuit for injunctive relief from the outstanding judgment of $37, 375.00. Review of Muckey v Pierce Supreme Court of WI June Term 1854 "To dismiss and appeal for such cause, leaving the judgment of the justice in force is erroneous."

If this Supreme Court would review it's decision Bell v Hood 327 U.S. 678 (1946) Mr. Justice Black states pg 3(3) "And it is established practice for this court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution (4) and to restrain individual state officers from doing what the 14th Amendment forbids the state to do (5) Moreover, where federal protected rights have been invaded, it has been the rule from the beginning that courts will adjust their remedies

so as to grant the necessary relief (6) and it is also well settled that where legal rights have been invaded, and a federal statue provides for a general right to sue for such an invasion, federal courts may use any available remedy to make the good the wrong done.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

The improper dismissal of my jury right not only violates my right, but society rights are affected. Dismissal of jury trial are governed by WI stats and protected by State and Federal constitutions.

"It is true that a right conferred on a provide party, but affecting the public interest may not be waive or released if such waiver or release contravenes the statutory policy." Brooklyn Savings Bank v O'Neil 324 U.S. 697 704 (1945)

CONCLUSION

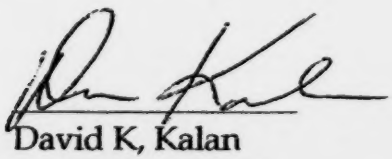
The City of St. Francis seize, my property for satisfaction of the $37,375.00 judgment but can not provide me with necessary documentation of satisfaction to clear my credit report because of the procedure violations in dismissing my jury demand . Judge Burns ordered the seizer of my property yet satisfaction of judgment belongs to Judge Tesmer.

Judge Burns reopen under section WI stat 806.07(1) (h) Extraordinary circumstances stating (transcript Feb.6, 1996 pg 3 line 9-12)..."back in 1991, was not really the product of his informed consent" Also stating "the appeal before Judge Tesmer, is still dangling and it's really her case."

It is cruel and unusual punishment to leave in force an outstanding judgment preventing me from clearing my wrongful credit report, and gaining credit form the banks. The 14th Amendment guarantee me "equal protection of the law" that protection protects the public rights.

The petition for writ of certiorari should be granted.

Respectfully submitted.



David K, Kalan
September 3, 2002

PROOF OF SERVICE

I David K. Kalan do swear or declare that on this date September 03, 2002, as required by Supreme Court Rule 29. I have serve the enclosed Petition for a writ of certiorari on each party to the above proceeding or the party's counsel, and on every other person required to be served, by the depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with return receipt first class postage prepaid.

The names and address of those served are as follows

Attorney Richards
Vlasak & Britton S.C.
735 N. Water St 16th Floor West
Milwaukee WI. 53202

I declare under penalty of perjury that the fore going is true and correct.

Executed on September 03, 2002

APPENDIX A

United States Court of Appeals ch
For the Seventh Circuit
Chicago, Illinois 60604

Submitted June 18, 2002
Decided July 9, 2002

Before

Hon. MICHAEL S. Kanne, *Circuit Judge*

Hon. ILANA DIAMOND ROVNER, *Circuit Judge*

Hon. ANN CLAIRE WILLIAMS, *Circuit Judge*

DAVID K. KALAN, Plaintiff-Appellant, No. 02-1870 v. CITY OF ST. FRANCIS, Defendant-Appelee.	] Appeal from the United] States District Court for] the Eastern District of] Wisconsin.]] No. 92 C 1306]] J. P. Stadtmueller,] Chief Judge.

Upon consideration of the **MOTION FOR INJUNCTIVE RELIEF**, filed on June 6, 2002, by the pro se appellant,

IT IS ORDERED that the motion is **DENIED**.

IT IS FURTHER ORDERED that the judgment of the district court is summarily **AFFIRMED**.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

DAVID K. KALAN,

Plaintiff,

Case No. 92-C-1306

CITY OF ST. FRANCIS,

Defendant,

ORDER

On January 25, 2002, *pro se* plaintiff David K. Kalan ["Kalan"] filed a motion pursuant to Federal Rule of Civil Procedure 60(b)(5) and (6) seeking relief from judgment from United States Magistrate Judge Robert L. Bittner's July 26, 1993 order. In his one-page motion, Kalan respectfully demands that the court order the Municipal Court of the City of St. Francis to reopen a case that is almost a decade old and release Kalan from a $37, 375.00 judgment. Kalan also argues that the court remove a $1000 sanction imposed by Magistrate Bittner in his July 26, 1993 order. Kalan's entire argument in support of his motion consists of one sentence: Kalan claims that he was denied a jury trial and that the outstanding judgment affects his credit.

BACKGROUND

Beginning in November, 1989, Mr. Kalan received numerous citations from the City of St. Francis ["City"] relating to the maintenance of properties that he owned. When the City could not informally resolve the ordinance violations, it commenced an action against Kalan. On August 27, 1990, City Municipal Judge Michael D. Novak found Kalan guilty on thirty-one counts of City maintenance code violations and fined him $30,500.00 plus court costs for a total judgment against Kalan of $37,375.00. Kalan, represented by counsel, appealed the municipal court judgment to

Milwaukee County Circuit Court, seeking a jury trial. Kalan's appeal, Case No. 1-900469, was assigned to Milwaukee Circuit Court Judge Louise M. Tesmer.

On March 31, 1991, the City brought a separate action against Kalan in Milwaukee County Circuit Court alleging that Kalan violated a restrictive covenant and terms of a building permit on one property and violated a building permit and lacked an occupancy permit on another property. The City's action, Case No. 1-CV-007-608, was assigned to Milwaukee County Circuit Judge George A. Burns, Jr.

Judge Burns conducted a settlement conference with the parties. Kalan, represented by counsel, and the City reached a stipulated settlement in which both Case No. 1-900469 and Case No. 91-CV-007-608 would be dismissed subject to certain conditions. In accordance with the stipulation, Judge Burns entered judgment in Case No. 91-CV-007-608 on October 28, 1991, and Judge Tesmer granted the City's motion to dismiss in Case No. 1-900479 on November 21, 1991.

More than a year later, Kalan appears to have a changed his mind regarding the stipulation that dismissed both cases. On January 22, 1993, Kalan filed a pro se motion to reopen the judgment entered in Case No. 91-CV-007-608 which was denied on February 1, 1993. On December 7, 1992, Kalan also filed an action in federal court alleging that the City violated his constitutional rights. On July 26, 1993, Magistrate Judge Bittner held that plaintiff's action was barred under the doctrine of res judicata and granted the City's motion for summary judgment as well as awarding sanction against kalan in the amount of $1,000.

ANALYSIS

Kalan seeks relief from judgment under Federal Rule of Civil Procedure 60(b)(5) and (6). Kalan bears the burden of showing that he is entitled to relief from judgment under Rule 60. *See, e.g., Money Store, Inc. v. Harriscorp Finance,* Inc., 885 F.2d 369, 372 (7th Cir. 1989). Moreover, motions made under Rule 60 must be made within a reasonable time. *See* Rule 60(b).

Kalan presents no evidence, analysis, or scrap of argument that entitles him to relief. Kalan states that he was denied a jury trial, but fails to mention that he stipulated to a judgment

dismissing both actions while he was represented by counsel. Kalan offers no evidence which would show that his consent in dismissing the actions was ineffective. Examining the record, Kalan appears to imply that Judge Burns reversed his earlier judgment on February 6, 1995. Kalan, however, does not identify the proceeding in which this occurred or submit affidavits or transcripts to substantiate the assertion, nor does Kalan explain how such an order from Judge Burns entitles Kalan to relief in this court. In other words, Kalan does meet his burden to provide sufficient information for this court to conclude that Kalan is entitle to relief from judgment.

The court also finds that Kalan has not brought his motion within a reasonable time. If Kalan knew or should have known that Judge Burns reversed his earlier judgment on February 6, 1995, Kalan provides no reason why he waited to bring this current motion until years later. Kalan provides no reason for his significant delay in seeking relief from judgment.

One final reason that Kalan's motion must be denied is his failure to establish any element to show that he is entitled to injunctive relief. *See Nalco Chemical Co. v. Hydro Technologies, Inc.*, 983 F.2d 801 (7th Cir. 1993) (stating necessary elements for injunctive relief).

The court will not grant the City's request for sanctions, but the court warns Kalan that any further frivolous motions will be met with significant sanctions from the court.

Accordingly,

IT IS ORDERED that Kalan's motion for relief from judgment and for injunctive relief be and the same are hereby **DENIED**.

Dated at Milwaukee, Wisconsin this 25th day of March, 2002.

BY THE COURT:

/s/_____

J.P. Stadtmueller
Chief Judge

Supreme Court, U.S.
FILED
OCT 28 2002
OFFICE OF THE CLERK

No. 02-0488

In The Supreme Court of the United States

DAVID KALAN,

Petitioner,

v.

THE CITY OF ST. FRANCIS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM J. RICHARDS
Counsel of Record
LARRY J. BRITTON
BRITTON & REIHER, S.C.
735 N. Water Street,
Suite 1600 West
Milwaukee, WI 53202
(414) 273-2900 (Phone)
(414) 273-2905 (Fax)

Counsel for the City of St. Francis

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTER QUESTIONS PRESENTED

Pursuant to Sup. Ct. R. 15.2, respondent objects to the question presented by the petition because it seeks consideration of questions not appropriately arising from, or otherwise accurately reflecting, the proceedings or the holdings below. If this court grants the petition, respondent submits that the following are the more accurately phrased questions:

1. DID THE DISTRICT COURT ABUSE ITS DISCRETION IN DENYING PETITIONER'S FED. R. CIV. P. 60B MOTION WHERE PLAINTIFF PROVIDED NO SUPPORT FOR HIS MOTION AND WAITED OVER FIVE YEARS TO BRING THE MOTION?

2. DID THE DISTRICT COURT ABUSE ITS DISCRETION IN DENYING PETITIONER'S REQUEST FOR INJUNCTION WHERE PETITIONER PROVIDED NO SUPPORT FOR HIS MOTION AND MEETS NONE OF THE CRITERIA FOR AN INJUNCTION?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sup. Ct. R. 29.6, Respondent submits that it is a governmental entity and, therefore, no additional disclosure needs to be made.

TABLE OF CONTENTS

		Page
I.	COUNTER QUESTIONS PRESENTED	i
II.	CORPORATE DISCLOSURE STATEMENT	ii
III.	TABLE OF CONTENTS	iii
IV.	TABLE OF AUTHORITIES	iv
V.	STATEMENT OF THE CASE	1
	A. COURSE OF PROCEEDINGS	1
	B. STATEMENT OF FACTS	2
VI.	REASONS FOR DENYING THE WRIT	6
	A. NEITHER THE COURT OF APPEALS' NOR THE DISTRICT COURT'S DECISION CONFLICTS WITH THE DECISIONS OF THIS COURT OR OTHER COURTS BECAUSE PETITIONER PROVIDED NO BASIS FOR HIS MOTION	6
	B. THE DECISIONS OF THE DISTRICT COURT AND SEVENTH CIRCUIT THAT TOO MUCH TIME HAS PASSED TO BRING A RULE 60 MOTION DO NOT CONFLICT WITH ANY DECISION BY THIS COURT OR ANY OTHER	7
	C. THE DENIALS OF THE PETITIONER'S REQUEST FOR AN INJUNCTION IS SUPPORTED BY ALL APPLICABLE LAW	8
	D. THE DECISIONS OF THE DISTRICT COURT AND THE SEVENTH CIRCUIT DO NOT RAISE IMPORTANT FEDERAL QUESTIONS	10
VII.	CONCLUSION	11

TABLE OF AUTHORITIES

Page

CASES

Barnes v. American Broadcasting Company, 259 F.2d 858 (7th Cir. 1958), *cert. denied*, 79 S. Ct. 727, 359 U.S. 946, 3 L.Ed.2d 679 (1959) 6

Carriage Properties, Inc. v. Arrington, 152 F.R.D. 488 (E.D. Pa. 1994) 7

Delzona Corp. v. Saks, 265 F.2d 157 (3rd Cir. 1959) 7

Frank v. New Amsterdam Casualty Co., 27 F.R.D. 258 (Pa. 1961) 6

Gilmore v. Hinman, 191 F.2d 652 (D.C. Cir. 1951) 7

Gulf & Western Corp. v. Craftique Productions, Inc., 523 F. Supp. 603 (D.C.N.Y. 1981) 9

In re Cantwell, 17 B.R. 639 (Pa. Bankr. 1982) 6

In re Petition of Pui Lan Yee, 20 F.R.D. 399 (D.C. Cal. 1957) 6

Kalan v. City of St. Francis, 274 F.3d 1150 (7th Cir. 2001) 2

Morris Stash Starrett Products Co. v. Steccone, 205 F.2d 244 (9th Cir. 1953) 7

Nalco Chemical Co. v. Hydro Technologies, Inc., et al., 984 F.2d 801 (7th Cir. 1993) 9, 10

O'Connor v. Board of Education of School Dist. No. 23, 645 F.2d 578 (7th Cir. 1981), *cert. denied*, 102 S. Ct. 641, 454 U.S. 1084, 70 L.Ed.2d 619 (1981) 10

Patel v. Lutheran Medical Center, Inc., 775 F. Supp. 592 (E.D.N.Y. 1991) 6

TABLE OF AUTHORITIES – Continued

Page

Plain Dealer Publishing. Co. v. Cleveland Typographical Union No. 53, 520 F.2d 1220 (6th Cir. 1975), *cert. denied,* 96 S. Ct. 3221, 428 U.S. 909, 49 L.Ed.2d 1217 (1976) 10

Rhodes v. Houston, 418 F.2d 1309 (8th Cir. 1969), *cert. denied*, 90 S. Ct. 1382, 397 U.S. 1049, 25 L.Ed.2d 602 (1970) 7, 11

Sunbeam Corp. v. Charles Appliances, Inc., 119 F. Supp. 492 (S.D.N.Y. 1953) 7

Sutherland v. Fitzgerald, 291 F.2d 846 (10th Cir. 1961) 6

Thorn v. Harrisburg Trust Company, 330 F.2d 34 (10th Cir. 1964), *cert. denied*, 85 S. Ct. 611, 379 U.S. 646, 13 L.Ed.2d 551 (1965) 6

OTHER AUTHORITIES

28 U.S.C. § 636(c) 1, 4

28 U.S.C. § 1331 1

Fed. R. Civ. P. 11 4

Fed. R. Civ. P. 60 ..... *passim*

Fed. R. Civ. P. 60(b) 5, 8

Fed. R. Civ. P. 60(b)(5) 1, 4, 7, 8

Fed. R. Civ. P. 60(b)(6) 1, 4, 7, 8

Rule 13.05(a) (E.D. of Wis.) 4

Sup. Ct. R. 15.2. 1

Sup. Ct. R. 24.2 1

Sup. Ct. R. 29.6 ii

STATEMENT OF THE CASE

Respondent cannot accept Petitioner's statement of the case because it omits or otherwise misstates pertinent procedural facts and sets forth purported "undisputed" facts that are misleading. Sup. Ct. R. 15.2 and Sup. Ct. R. 24.2. The following matters should be considered by the court in ruling on the petition.

A. COURSE OF PROCEEDINGS

On December 17, 1992, David Kalan (hereinafter "Petitioner") filed a *pro se* action alleging the City of St. Francis (hereinafter "Respondent") violated his civil rights. Therefore, the Petitioner's case was before the district court pursuant to 28 U.S.C. § 1331.

On December 28, 1992 and February 1, 1993, Petitioner and Respondent consented to United States Magistrate Judge's jurisdiction. On July 26, 1993, Magistrate Judge Bittner ruled that Petitioner's action was barred under the doctrine of *res judicata* and granted the Respondent's summary judgment and awarded sanctions in the amount of $1,000.00.

Seven years later, on April 13, 2000, Petitioner filed his motion for relief from judgment pursuant to Fed. R. Civ. P 60(b)(5) and (6). On July 6, 2000, Magistrate Judge Gorence denied the Motion. On July 27, 2000, Petitioner filed a notice of appeal of the July 6, 2000 denial of his Rule 60 Motion. The Seventh Circuit appointed *amicus* to represent Petitioner's interest regarding its jurisdiction under the Magistrates Act, 28 U.S.C. § 636(c). On December 17, 2001, the Seventh Circuit determined that it did

not have jurisdiction because Petitioner had not specifically stipulated to Magistrate Gorence hearing the matter, dismissed the appeal and remanded the case to the trial court. *Kalan v. City of St. Francis*, 274 F.3d 1150 (7th Cir. 2001).

On January 25, 2002, Petitioner filed a new motion in the district court, this one for injunctive relief. On February 5, 2002, the Respondent filed its new brief in opposition to Petitioner's Rule 60 Motion with the district court judge, the Honorable J.P. Stadtmueller. Petitioner replied on February 8, 2002. Respondent filed a brief in opposition to Petitioner's Motion for injunctive relief on February 25, 2002. The district court issued its decision on March 25, 2002 denying all the Petitioner's motions. The Petitioner filed its notice of appeal and docketing statement with the Seventh Circuit on April 5, 2002. The matter was briefed and the Seventh Circuit summarily affirmed Judge Stadtmueller's decision on July 9, 2002. Petitioner filed a Petition for Writ of Certiorari on September 25, 2002.

B. STATEMENT OF FACTS

In November 1989, the Petitioner received numerous citations from the Respondent, the City of St. Francis, because of maintenance of properties he owned in the City of St. Francis. When Respondent could not resolve the ordinance violations with Petitioner, it commenced an action against him. On August 27, 1990, City Municipal Judge Michael J. Novak found the Petitioner guilty on 31 counts of City maintenance code violations and fined him $35,000.00, plus court costs, for a total judgment against Petitioner in the amount of $37,375.00. Petitioner, who was represented by counsel, appealed the Municipal Court judgment to the Milwaukee County Circuit Court, seeking

a jury trial. The appeal, Case No. 91-CV-00469, was assigned to Milwaukee County Circuit Court Judge Louise M. Tessmer. On May 8, 1991, Judge Tessmer denied Petitioner's motion seeking dismissal of Respondent's complaint rejecting his contention that the ordinance at issue was invalid.

On March 31, 1991, the Respondent commenced an action against Petitioner in Milwaukee County Circuit Court alleging that Petitioner violated the restrictive covenant and terms of a building permit on one property and violated a building permit and had a lack of an occupancy permit on another property. The Respondent's action, which was designated as Case No. 91-CV-007608, was assigned to Milwaukee County Circuit Court Judge George A. Burns.

Judge Burns conducted a settlement conference with the parties. The conference resulted in a stipulated judgment that Petitioner's appeal in Case No. 91-CV-00469 and the City's action in Case No. 91-CV-007608 would be dismissed subject to specific conditions. Petitioner, represented by counsel, agreed to the terms of the stipulation for judgment and, upon extensive questioning by Judge Burns, acknowledged that he understood the terms of the stipulation and that his agreement was voluntary. On October 28, 1991, in accordance with the stipulation between the parties, judgment was entered in Case No. 91-CV-07608. On November 21, 1991, the City's Motion to dismiss Case No. 91-CV-00469 was granted by oral decision of Judge Tessmer. On December 22, 1992, Petitioner filed a *pro se* motion to reopen the judgment entered in Case No. 91-CV-007608, which was denied at a February 1, 1993 hearing. Petitioner did not appeal that denial or move to reopen Case No. 91-CV-00469.

On December 7, 1992, Petitioner, who was proceeding *pro se*, commenced an action in the United States District Court for the Eastern District of Wisconsin alleging that Respondent violated his constitutional rights. During a pretrial conference held by Magistrate Judge Bittner on January 26, 1993, Respondent stated its intent to pursue Fed. R. Civ. P. 11 sanctions against Petitioner if he proceeded with the action. After discussion, Petitioner agreed to dismiss the action on its merits. Counsel for St. Francis confirmed the agreement to dismiss the case in writing and forwarded a stipulation for dismissal to Petitioner for signature. On February 5, 1993, however, Petitioner "changed his mind," and the parties each filed Motions for summary judgment and sanctions. Magistrate Judge Bittner issued a decision on the summary judgment Motions and Motions for Fed. R. Civ. P. 11 sanctions filed by Petitioner, as well as the Respondent, on July 26, 1993. Magistrate Judge Bittner applied the doctrine of *res judicata* to the cross Motions for summary judgment and denied Petitioner's Motion and granted Respondent's Motion. Magistrate Bittner granted the Respondent's Motion for sanctions in the amount of $1,000.00 against Petitioner and denied Petitioner's Motion against Respondent.

Petitioner filed a Motion for relief from the judgment pursuant to Fed. R. Civ. P. 60(b)(5) and (6) on April 13, 2000. Petitioner sought relief from the judgment entered in this case by U.S. Magistrate Judge Robert L. Bittner on July 26, 1993. The parties had previously consented to United States Magistrate Judge jurisdiction pursuant to 28 U.S.C. § 636(c) and local Rule 13.05(a) (E.D. of Wis.) while the original action was pending. Originally, Magistrate Judge Gorence denied Petitioner's Rule 60 Motion.

On July 27, 2000, Petitioner filed his notice of appeal of the July 6, 2000 denial of his Rule 60 Motion. The Seventh Circuit appointed *amicus* to represent Petitioner's interest regarding its jurisdiction under the Magistrate Act.

On December 17, 2001, the Seventh Circuit determined that it did not have jurisdiction because Petitioner did not stipulate to Magistrate Gorence, specifically, hearing the matter, dismissed the appeal and remanded to the trial court. On January 25, 2002, Petitioner filed a new Motion for injunctive relief. Judge Stadtmueller issued his decision on March 25, 2002 denying all Motions filed by Petitioner.

Judge Stadtmueller denied Petitioner's Rule 60(b) Motion for two reasons. First, that Petitioner presented no evidence, analysis or argument whatsoever that entitles him to relief. Second, that Petitioner had not brought his Motion within a reasonable time. The district court denied Petitioner's Motion for an injunction because he failed to establish any element of the necessity for an injunction.

The Seventh Circuit summarily affirmed Judge Stadtmueller's decision.

REASONS FOR DENYING THE WRIT

A. NEITHER THE COURT OF APPEALS' NOR THE DISTRICT COURT'S DECISION CONFLICTS WITH THE DECISIONS OF THIS COURT OR OTHER COURTS BECAUSE PETITIONER PROVIDED NO BASIS FOR HIS MOTION.

The district court and Seventh Circuit properly denied Petitioner's Rule 60 motion because he provided no support for his motion. Both courts also agreed that too much time had passed from the decision of the court to bring the Motion with no explanation for delay.

Petitioner seeks review of the Seventh Circuit's decision based on his contention that various decisions conflict with some other decisions of this court or some other court. Petitioner makes this claim without reference to specific authority. The decisions are uniform on this issue.

The courts are uniform in their view that a Rule 60 movant must come forward with legal and factual support for his request. *Thorn v. Harrisburg Trust Company*, 330 F.2d 34 (10th Cir. 1964), *cert. denied*, 85 S. Ct. 611, 379 U.S. 646, 13 L.Ed.2d 551 (1965); *Sutherland v. Fitzgerald*, 291 F.2d 846, 847 (10th Cir. 1961); *Barnes v. American Broadcasting Company*, 259 F.2d 858 (7th Cir. 1958), *cert. denied*, 79 S. Ct. 727, 359 U.S. 946, 3 L.Ed.2d 679 (1959); *Patel v. Lutheran Medical Center, Inc.*, 775 F. Supp. 592, 598 (E.D.N.Y. 1991); *Frank v. New Amsterdam Casualty Co.*, 27 F.R.D. 258, 260 (Pa. 1961); *In re Petition of Pui Lan Yee*, 20 F.R.D. 399, 400-401 (D.C. Cal. 1957); *In re Cantwell*, 17 B.R. 639 (Pa. Bankr. 1982). If the Petitioner seeks to open a judgment, he must produce credible

factual allegations to establish a meritorious defense; if he fails to sustain his burden, the petition to open the judgment must be denied. *Carriage Properties, Inc. v. Arrington*, 152 F.R.D. 488, 490 (E.D. Pa. 1994). Therefore, there can be no argument that the ruling is in conflict with any decision of this court or any of the circuit or district courts.

B. THE DECISIONS OF THE DISTRICT COURT AND SEVENTH CIRCUIT THAT TOO MUCH TIME HAS PASSED TO BRING A RULE 60 MOTION DO NOT CONFLICT WITH ANY DECISION BY THIS COURT OR ANY OTHER.

Judge Stadtmueller found that Petitioner did not bring his Motion within a reasonable time. The Seventh Circuit affirmed this decision. As shown above, Petitioner waited over five years to bring this action. The Petitioner then filed moving papers that included no reason for the five-year delay. If there were any error regarding the judge's decision, Petitioner knew about it on the date the court's order was issued.

The courts have uniformly held that excessive delays may preclude Rule 60(b)(5) and (6) relief. The failure to promptly file motions is viewed unfavorably when the movant had knowledge of the facts which later forms the basis of the complaint. *See Delzona Corp. v. Saks*, 265 F.2d 157 (3rd Cir. 1959) (where movant possessed facts complained of eighteen months delay too long); *Morris Stash Starrett Products Co. v. Steccone*, 205 F.2d 244 (9th Cir. 1953) (22 months); *Gilmore v. Hinman*, 191 F.2d 652, 653 (D.C. Cir. 1951) (16 months not a "reasonable" time); *Sunbeam Corp. v. Charles Appliances, Inc.*, 119 F. Supp. 492, 494 (S.D.N.Y. 1953) (29 months delay so unreasonable as to preclude relief); *Rhodes v. Houston*, 418 F.2d 1309,

1311 (8th Cir. 1969), *cert. denied*, 90 S. Ct. 1382, 397 U.S. 1049, 25 L.Ed.2d 602 (1970) (6 years too long).

In the Petitioner's case, the event that precipitated the filing of the Rule 60 Motion allegedly occurred on February 6, 1995. Petitioner filed his Motion on April 3, 2000, over 5 years after the event that gave rise to the Motion. Petitioner's Motion papers are devoid of explanation for the delay in seeking relief.

The district court carefully considered the Petitioner's Motion. The Petitioner failed to establish that he was entitled to relief from the judgment pursuant to Fed. R. Civ. P. 60(b). Moreover, even if the Petitioner had established that the circumstances in this case fell within the general parameters of Rule 60(b)(5) and/or (6), the Petitioner would also have to establish that his Motion was brought within a "reasonable" time. Although the Motion brought under these circumstances are not subject to an enumerated time limit, the Rule requires that they be brought "within a reasonable time period." The courts have been clear, five years is entirely too long.

C. THE DENIAL OF THE PETITIONER'S REQUEST FOR AN INJUNCTION IS SUPPORTED BY ALL APPLICABLE LAW.

In order to show that he is entitled to injunctive relief, Petitioner must show that:

1. The case has some likelihood of success on the merits;

2. He has no adequate remedy at law and that without the injunction he will suffer irreparable harm;

3. Any irreparable harm the City of St. Francis will suffer is outweighed by the harm Kalan will suffer if the injunction is not granted;

4. The public interest requires granting the injunction.

Nalco Chemical Co. v. Hydro Technologies, Inc., et al., 984 F.2d 801, 802 (7th Cir. 1993).

Petitioner cannot make out any of these factors. First, he has no likelihood of success on the merits. As shown above, there is no basis for his request for relief under Fed. R. Civ. P. 60. Second, there clearly is a remedy available at law. In fact, all of the items that Petitioner requests are remedies of law. Similarly, there appears to be no irreparable harm that Petitioner will suffer. A money judgment being issued against him does not constitute irreparable harm. *Gulf & Western Corp. v. Craftique Productions, Inc.*, 523 F. Supp. 603, 607 (D.C.N.Y. 1981). Similarly, the granting of monetary sanctions against him does not constitute irreparable harm. Third, because Petitioner will not suffer irreparable harm, there can be no findings that the harm he will suffer will outweigh any harm to the Respondent. Finally, the public interest does not support Petitioner's position. In fact, the public's interest in the finality of judgments greatly outweighs any harm allegedly suffered by the Petitioner. Petitioner has pointed to no law contrary to that correctly followed by the district court and the Seventh Circuit anywhere in the country. Petitioner also failed to enumerate any basis for his motion.

The standard for granting or denying a preliminary injunction was announced and followed by the district court and the Seventh Circuit in this case and is consistent with the law as outlined by the courts. *Nalco Chemical Co.*, 984 F.2d at 802; *O'Connor v. Board of Education of School Dist. No. 23,* 645 F.2d 578, 580 (7th Cir. 1981), *cert. denied,* 102 S. Ct. 641, 454 U.S. 1084, 70 L.Ed.2d 619 (1981); *Plain Dealer Publishing. Co. v. Cleveland Typographical Union No. 53,* 520 F.2d 1220 (6th Cir. 1975), *cert. denied,* 96 S. Ct. 3221, 428 U.S. 909, 49 L.Ed.2d 1217 (1976). The standard is well known, well accepted and has been consistently followed by the district court and the Seventh Circuit here.

D. THE DECISIONS OF THE DISTRICT COURT AND THE SEVENTH CIRCUIT DO NOT RAISE IMPORTANT FEDERAL QUESTIONS.

As shown above, the questions presented in this petition are relatively garden-variety application of law to fact. The grounds for the court's decision of whether the Respondent has provided sufficient basis for a Fed. R. Civ. P. 60 motion are well known and were followed by the district court and the Seventh Circuit. The courts that reviewed this decision used well known, well accepted precedent to determine that Petitioners five-year delay precluded granting his motion. Similarly, the courts that have reviewed Petitioner's request for an injunction followed well known and frequently announced legal standards in denying Petitioner's motion. The Petitioner's failure to come forward with any basis for his request does not raise an important question for this Court's review.

CONCLUSION

In sum, the Petitioner provides no evidence or basis on which the district court could grant his Rule 60 motion or the Seventh Circuit could overturn that decision. The legal standard followed by the Seventh Circuit and the Eastern District of Wisconsin fully complies with the law previously announced by this Court and other courts. Finally, Petitioner has clearly presented no important federal question for which it would be necessary for this court to rule.

This court's denial of Mr. Kalan's petition may give finality to this decade long dispute. The denial of the petition will send to Mr. Kalan the same message the Eighth Circuit sent in *Rhodes*. "We hope – and we say this with intended kindness – that Mr. Rhodes will not further deplete his energies and substance on these causes which were final and lost long ago." *Rhodes*, 418 F.2d at 1311.

Respectfully Submitted,

WILLIAM J. RICHARDS
Counsel of Record
LARRY J. BRITTON
BRITTON & REIHER, S.C.
735 N. Water Street,
Suite 1600 West
Milwaukee, WI 53202
(414) 273-2900 (Phone)
(414) 273-2905 (Fax)

Counsel for the City of St. Francis

3

Supreme Court, U.S.
FILED
NOV 6 2002
CLERK

NO. 02-488

In The

SUPREME COURT OF THE UNITED STATES

David K. Kalan pro sec, Petitioner

v.

City of St. Francis, Respondents

On Petition for Writ of Certiorari
United States Court of Appeals 7th Cir and
United States District Court Eastern District of Wisconsin

RESPONSE TO BRIEF IN OPPOSITION FOR WRIT OF CERTIORARI

David K. Kalan pro sec,
3272 S. Dayfield Ave
Milwaukee WI. 53207
(414) 482-4531

6 PP

TABLE OF AUTHORITIES

Boyed v United State 116 U.S. 616, 636 3

Brooklyn Savings Bank v O Neal 324 U.S. 697 704 (1945) 1, 2

New York v Hill No 98-1299 ..... 1, 2

Reburg v Lang (1942) 1 N.W. 2d 759, 239 Wis 381 ..... 1, 2

United States v Tittjung 235 F.3d 330, 335 (7th Cir 2000). Denied, 121 S. Ct 2554 (2001) 2

924 16 B Am Jur 2d 522 executive and judicial 1

WISCONSIN STATUTES

802.06 motions for dismissal 1

805.05 consolidations of separate trials 1

805.01 Jury trial of right 1

RESPONDENTS STATE THAT I PROVIDED NO BASIS FOR RULE 60 MOTION.

Review of Brief in Opposition Page 3 "Judge Burns conducted a settlement conference with the parties. The conference resulted in a stipulated judgment that the Petitioner's appeal in Case No.91-CV-00469 and the City's action in Case No. 91-CV-007608 would be dismissed subject to specific conditions."

First and foremost, Jury Demand Case No. 1900469 was assigned to Criminal Court Judge Tesmer, Judge Burns has no jurisdiction. The Stipulation is a nullity, it has no legal effect on dismissing Jury trial 1900469. WI stats 802.06 govern motions for dismissal, WI stat 805.05 govern consolidation of separate trials, and WI stat 805.01 Jury Trial of Right. These statues are Wisconsin law and cannot be waive by stipulation. See Brooklyn Savings Bank v O'Neal 324 U.S. 697 704 (1945) "Every state official, high and low is bound by the 14th Amendment including official of the executive and judicial." 924 16B Am Jur 2d 522.

The improper dismissal of my jury right as a result of the stipulation is unlawful, and provides the basis for my Rule 60 Motion. The District Court and the Court of Appeals for the 7th Circuit cite Res judicata to an illegal stipulation. This Supreme Court must determine the stipulation a nullity, having no legal effect on dismissing my Jury Right, Judge Tesmer Case 1900469. New York v Hill No 98-1299 certain fundamental rights can not be waived by stipulation. Judge Burns has no jurisdiction to stipulate change in WI Stats. Art. 7,2s 13. Jurisdiction-In-General "The term "jurisdiction" includes not only jurisdiction over persons and subject matter, but also

power to render a particular form of judgment." Reburg v Lang (1942) 1 N.W. 2d 759, 239 Wis 381.

This court has the independent duty to determine whether jurisdiction exists in every case. See United States v Tittjung 235 F. 3d 330,335 (7th Cir 2000), denied, 121 S. Ct. 2554 (2001).

RESPONDENTS STATE TOO MUCH TIME AS PASSED TO BRING RULE 60 MOTION

New York v Hill was decided January 11, 2000; I had no compelling case to bring Rule 60 Motion till I discovered this recent Supreme Court ruling. Rule 60 Motion is not subject to enumerated time limit. (6) Any other reason justifying relied from operation of the judgment.

RESPONDENTS STATE THE DENIAL OF REQUEST FOR AN INJUNCTION IS SUPPORT BY ALL APPLICABLE LAW.

The public interest is not protected if a City Attorney can openly, admittedly violate jury procedures by stipulation, and not have the Federal Court address the violation of WI Statutes. Brooklyn Savings Bank v O'Neal 324 U.S. 697, 704 (1945)

CONCLUSION

Respondents state that I did not appeal a pro sec motion to reopen the judgment entered in Case No 91-CV-007608, which was denied at a February 1, 1993 hearing.pg3

Clearly Respondents are misleading this court. Court of Appeal District 1 September 13, 1994, No 93-1671 reversed Judge Burns and Judge Burns reopen under section 806.07 (1)(h) "Extraordinary circumstances" stating (Transcript Feb. 6, 1996 pg3 line 9-12) "back in 1991, was not really the product of his informed consent."

Judge Burns also confirmed that City of St. Francis violated procedures in bringing an action for injunctive relief in circuit court. (Transcript Feb. 12, 1996, pg 11 line 5-7) "I know why you brought an action in circuit court because you wanted to get some injunctive relief here but never in all my time on the bench—Because the procedure is so clumsy you have to follow a criminal procedure of the court finding probable cause or you can have the court summon the defendant before the Court All those procedures you don't use that: Do you, Are you aware of that procedure? Mr. Staats: Yes your Honor. The Court: you don't use it thought? You didn't use it here? Mr. Staats: No, I didn't your Honor: The Court: That's a fatal flaw."

"Speaking by Mr. Justice Bradley, we have declared in Boyed v United States 116 U.S. 616, 636 that it "is the duty of the courts to be watchful for the constitutional rights of the citizen."

This Supreme Court must be watchful for my constitutional First Amendment right to get relief, justice and redress, including financial relief. I have a 1st Amendment right to be free of this outstanding $37,375.00 judgment and to correct my credit history.

The names and address of those served are as follows

Attorney Richards
Vlasak & Britton S.C.
735 N. Water St. 16th Floor West
Milwaukee WI 53207

Executed on November 5, 2002

David K. Kalan
3272 S. Dayfield Ave
Milwaukee Wi 53207
(414) 482-4531